

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 290 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

MAHESANA DIST CO OP MILK PRODUCERS UNION LTD

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR JP SHAH for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

and

MR.JUSTICE K.M.MEHTA

Date of decision: 24/12/1999

ORAL JUDGEMENT

At the instance of the assessee, the present reference is made before this court wherein following questions have been referred:

- (i) "Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in holding that the contribution paid as per the provisions of Section 69 of the Gujarat Rajya Cooperative Societies Act, 1961 is not deductible in computation of total income ?
- (ii) Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in holding that depreciation was not admissible on 30% value of the Plant and Machinery received from Indian Dairy Corporation?
- (iii) Whether, on the facts, the Appellate Tribunal was right in law in holding that 30% of value of the plant and machinery received from Indian Dairy Corporation was not to be included in computation of capital employed for the purpose of granting relief under Section 80-J?"

The Assessee Mehsana District Cooperative Milk Producers' Union Limited, Mehsana, a cooperative society registered under the provisions of Gujarat Cooperative Societies Act, 1961 was assessed for the assessment years 1976-77 and 1978-79.

So far as question No. 1 is concerned, in the case of the present assessee, for the earlier assessment years, Division Bench of this Court was required to consider the similar facts (203 ITR 601). The question raised before the court was as under :

"(2) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the contribution made by the assessee to the Gujarat Cooperative Education Fund was not an allowable deduction in computing the total income of the assessee for the assessment years 1967-68 to 1972-73?"

The contribution was in compliance of Section 69 of the Gujarat Cooperative Societies Act, 1961. Relevant provision of Section 69 reads as under :

"Every society which declares, out of current year's profit, a dividend to its members at the rate of 30% or more, shall contribute towards the educational fund of the Gujarat State Cooperative Union at such rate as may be prescribed".

Rule 31 of the Gujarat Cooperative Societies Rules, 1965 lays down the rates at which the society was required to contribute. Reading the provisions under Section 69 (1) of the Act and Rule 31 of the Gujarat Cooperative Societies Rules, 1965, it transpires that it was the duty of the cooperative society to contribute the amount on the basis of profits and gains. The Tribunal in para 25 of its judgment considered the aforesaid provisions and also section 40 (a) of the Income Tax Act, 1961 which reads as under :

"Notwithstanding anything contained in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head "profit and gains of business or profession.

(a) In the case of any assessee-

(i) x x x x x

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportionate of, or otherwise, on the basis of any such profits or gains."

The Tribunal expressed its opinion that the amount is to be paid not in order to earn income, but by way of application of income. Therefore, there can be no question of treating the said amount as expenditure. For the aforesaid purpose, the Tribunal relied on the decision of the Madras High Court in CIT vs. South Arcot District Cooperative Supply and Marketing Society Ltd., 127 ITR 467.

The Division Bench in the case of Mehsana District Coop. Milk Producers' Union Ltd. vs. CIT, (203 ITR 601) considered this case and the Division Bench pointed out that :

"The provisions of our Act cannot be said to be in pari materia with the provisions of the Madras Act and, therefore, the said provisions would not be applicable to a case arising under the Gujarat Act. We need not, however, consider the correctness of the reasons given by the Madras High Court as we are of the opinion that the contribution made by the assessee to the cooperative education fund is an allowable deduction under Section 37 of the Act".

The Division bench considered the provisions of law and held that:

"Thus, the assessee's claim for deduction was under Section 37 of the Act and when its claim is decided on the merits, it would not be proper to reject that claim only on the ground that the assessee had not made a specific claim in that behalf by reference to section 37 of the Act."

The Court held that the Tribunal was not right in holding that such contribution did not amount to a legitimate business outgoing.

It is required to be noted that payment was required to be made out of net profits made by the assessee and only because it had declared dividend. The said contribution, being statutory one, while computing real profit, the amount should be taken into consideration or not is the real question.

In the case of CIT vs. Kaira District Cooperative Milk Producers' Union Ltd. 203 ITR 898, the question referred to the Court was as under :

"3. Whether on the facts and in the circumstances of the case, the Income tax Appellate Tribunal [has been right in law in allowing a deduction of Rs. 21,203 being the contribution made to the Gujarat State Cooperative Union under section 69 of the Gujarat State Cooperative Societies Act?"

In view of the decisions referred to above viz. in the case of Mehsana District Cooperative Milk Producers\ Union vs. CIT and CIT vs. Kaira District Cooperative Milk Producers' Union, it must be held that contribution to Gujarat Cooperative Federal Education Fund was allowable as business expenditure. In our opinion, answer to question No. 1 must be in the negative i.e in favour of the assessee and against the revenue.

So far as the second question is concerned, one has to refer to the decision of the Apex Court in CIT vs. P.J.Chemicals Limited, 210 ITR 830. In that case, Government subsidy was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries. The specified percentage of the fixed capital cost, which is the basis for determining the subsidy , being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly to meet any portion of the "actual cost". The expression "actual cost" in section 43 (1) of the Act needs to be interpreted liberally. Such a subsidy does not partake of the incidents which attract the conditions for its deductibility from "actual cost". The amount of subsidy is not to be deducted from the "actual cost" under section 43 (1) for the purpose of calculation of depreciation,etc. The Tribunal appears to have been guided by the view that depreciation should be allowed only on "actual cost" to the assessee. The Tribunal's order cannot be said to be reasoned order on this question . But reading the order, it appears that Tribunal was guided by the reasonings recorded by the CIT (Appeals) , the relevant portion of which is reproduced hereunder:

"Indian Dairy Corporation had imported the machinery in question and supplied the same to the appellant under loan-cum-grant assistance scheme. To the extent to which the cost of the machinery was covered by the grant, it amounts to the cost being met directly or indirectly by any other person or authority and, therefore,, the value of such grant is rightly reduced by the ITO from the actual cost of the machinery in question while allowing the depreciation. The appeal on this point fails ".

The Apex Court has pointed out that expression "actual cost" needs to be interpreted liberally. Subsidy of the

nature we are concerned with, does not partake of the incidents which attract the conditions for their deductibility from "actual cost".

In view of that, answer to question No. 2 must be in the affirmative, i.e. in favour of the assessee and against the revenue.

So far as question No. 3 is concerned, the same is covered by the decision of the Division Bench of this Court in Banaskantha Dist. Co.Op. Milk Producers' Union vs. CIT, 210 ITR 962. The question raised before the court in the said case was as under :

"(1) Whether on the facts and in the circumstances of the case, the cost of the assets of the assessee to the extent of Rs. 10,92,237 being the amount given to it by the Gujarat Government by way of grant and loan should be taken into account in computing the capital employed by it for the purpose of section 80J of the Income tax Act, 1961 ?"

Considering the provisions of law, the Court partly answered the question in the affirmative and partly in the negative by holding that written down value of the assets of the assessee to the extent of the amount received by it as grant from the Government should not be taken into account in computing the capital employed by it for the purpose of section 80J, whereas the loan amount is required to be taken into account. In other words, question No.1 insofar as it relates to grant is answered in the negative i.e. in favour of revenue and against the assessee and as regards loan, the same is answered in the affirmative i.e. in favour of the assessee and against the revenue.

In the instant case, it is clear from the record that Government of Gujarat passed a resolution dated 16.2.1975, a copy of which is produced at page 57 of the paper book. According to the same, amount of 30% was to be treated as grant. Therefore, in view of the decision in the case of Banaskantha Dist. Co.Op. Milk Producers' Union (supra), the amount received by way of grant should not have been taken into account for considering capital employed by it for the purpose of Section 80J. Consequently, we answer question No.3 in affirmative i.e. in favour of the revenue and against the assessee.

We answer the questions referred to us accordingly.

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